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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 394

LUCY SGITCOVICH,

Petitioner,

vs.

ANNIE SGITCOVICH

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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vs.

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PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petitioner, Lucy Sgitcovich, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of Texas.

Summary Statement of the Matter Involved

This case involves the validity of the last clause of Rule 106 of Texas Rules of Civil Procedure. Rule 106, prior to December 31, 1947, provided for service of citation on a defendant in person. By an order dated August 18, 1947, Rule 106 was amended effective December 31, 1947 by the addition of the following language:

"Where it is impractical to secure personal service, as above directed, the court, upon motion, may authorize serv-

ice by leaving a copy of the citation, with petition attached, at the usual place of business of the party to be served, or by delivering same to anyone over sixteen years of age at the party's usual place of abode, *or in any other manner which will be reasonably effective to give the defendant notice of the suit.*" (Emphasis added.) It is this last clause which is under attack in the present suit.

The validity of such clause is contested on the ground that such rule does not meet the requirements of "due process of law," in violation of the Fourteenth Amendment to the Constitution of the United States, but is vague, indefinite, and does not furnish any intelligible standard or method to be observed to provide notice and an opportunity for a hearing, but leaves it to the attorneys of the state to devise individual methods of service of citation upon defendants, to be presented by motion to any of the state courts, and confers upon such courts a naked and arbitrary power to give or withhold consent.

A motion to serve citation on the defendant in this case, in a method devised by Plaintiff, set out in full (R. 1-5) was granted by the 113th Judicial District Court of Harris County (R. 5). Such motion was granted and thereafter a copy of the citation with petition attached was served upon five private citizens in two counties with instructions to mail the citation with petition attached to the defendant (R. 6, 7).

Citation was not served upon the defendant and she was not given notice of the suit. She did not participate in the trial either in person or by an attorney (R. 12).

Default judgment in the amount of $3964.69 was rendered against the defendant by the 113th Judicial District Court of Harris County, March 30, 1950 (R. 8-11).

Thereafter, defendant brought writ of error to the Court of Civil Appeals. Its jurisdiction is defined by the Consti-

tution of Texas and enabling Acts of the Legislature, providing "that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error." Constitution, Art. 5, sec. 6, Vernon's Ann. St., in part; R. S. Art. 1820. This court found that the defendant was not served with citation and was not given notice of the suit brought against her, and reversed and remanded the cause, holding that the method used in the trial court was violative of the elements of due process of law (R. 7). This opinion appears in 236 S. W. 2d 861 and is set out in full (R. 11-17). The Supreme Court of Texas reversed the judgment of the Court of Civil Appeals and affirmed the judgment of the trial court, holding that the manner of service of citation in this suit did not violate the "due process" clause of the Federal Constitution; that it was an unusual method of service but that it was included within the terms of the last clause of Rule 106; and that to hold otherwise would be to make meaningless the last clause of Rule 106; therefore the trial court had jurisdiction to enter the personal judgment against the defendant (R. 26). The opinion of the Supreme Court of Texas appears in 241 S. W. 2d 142 and is set forth in full (R. 18-27). The opinion is primarily based on the view as expressed in their opinion as follows (R. 22):

> "It is competent for each state to prescribe the mode of bringing parties before its courts. Although its regulations in this respect can have no extra-territorial operation, they are, nevertheless, binding on its own citizens. For, in respect to its own resident citizens, it is undoubtedly competent for the legislature to prescribe such modes of judicial proceeding as it may deem proper, to direct the manner of serving process; the notice which shall be given to defendants; and to declare the effect of a judgment rendered in pursuance of such notice."

The Supreme Court of Texas denied rehearing on July 25, 1951 (R. 43).

The matter involved in the case is that as to whether a state court may take the property of a citizen of the United States by adjudication without notice or due process of law as guaranteed by the Fourteenth Amendment on the premise that a state can prescribe any character of notice which shall be given to a defendant, if that defendant is a resident of that state.

This Court Has Jurisdiction

1. This court has jurisdiction under the Judicial Code, Section 237 (28 U. S. C. 344) "where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution."

The federal constitutional issues are properly preserved. This case presents constitutional issues as to both notice and an opportunity for hearing before the deprivation of property by adjudication as a minimum requirement of the due process clause. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. ed. 865.

At the first opportunity open to petitioner, upon knowledge of the suit, petitioner filed a Writ of Error to the Court of Civil Appeals. That court held that the method used in the trial court was violative of the elements of due process of law. The issue as to the validity of the service of citation in this case under the terms of the Fourteenth Amendment was preserved and presented to and determined by the Supreme Court of Texas, the highest court of the State. The closing sentences of the opinion of the Supreme Court of Texas clearly show that the federal issue was presented and decided (R. 26):

> "Therefore, it did not violate the due process clause of the Federal Constitution. It was an unusual method

> of service, but we hold it was included within the terms of the last clause of Rule 106. To hold otherwise would be to make meaningless the last clause of Rule 106, quoted above."

With respect to the validity of this last clause in Rule 106, the assignments of error presented to the Court of Civil Appeals on writ of error and the action by the Supreme Court of Texas upon these assignments and the assignments of error presented in Petitioner's Motion for Rehearing in the Supreme Court of Texas (R. 27-42) preserve Federal Constitutional issues as to due process of law and denial of right to notice and opportunity for hearing before an adjudication depriving a citizen of the United States of his property.

This rule under attack was promulgated by the Supreme Court of Texas. The Fourteenth Amendment applies to any law which the state "shall make or enforce."

2. There is a final judgment by the highest court in the state in which decision could be had. The decision of the Supreme Court of Texas constituted a final judgment and with the overruling of the motion for rehearing July 25, 1951, by that Court, all remedies in the state courts have been exhausted.

The Question Presented

The question presented to this court is whether the last Clause of Rule 106 of the Texas Rules of Civil Procedure authorizing service of citation, involved herein, deprives a citizen of the United States of the rights of notice and an opportunity to be heard, and establishes a judicial arbitrary mode of service of citation without prescribing a rule or method in terms definite enough to serve as a guide to those who have the duty imposed upon them, and to apprise those whom the rule may be used against.

This question presents the issue as to the correctness of

the state court's position that the state can authorize under a broad clause any method or form of substituted service upon any citizen within her territory on the premise that the power of the state to provide for such constructive service rests upon the classification of the citizen as a resident or nonresident of that state.

Reasons Relied On for Allowance of Writ

A substantial federal question presents itself with respect to the scope of state judicial power to confer upon its courts power to take away a United States Citizen's rights in personam without personal service or notice, or a designated procedure for substituted service with equal protection for all. The method of service of citation upon a defendant is left to the will of the courts of the State. The power conferred upon these courts is a naked and arbitrary power.

This court said in *Yick Wo* v. *Hopkins*, 118 U. S. 346-374, L. ed. 220, page 226:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any

material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where fre-dom prevails . . . In reference to that right, it was declared by the Supreme Judicial Court of Massachusetts, in Capen v. Foster, 12 Pick 485, 586, in the words of Chief Justice Shaw, "that in all cases where the Constitution has conferred a political right or privilege, and where the Constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power, to adopt any reasonable and *uniform* regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right, in a prompt, orderly and convenient manner," nevertheless, "such a construction would afford no warrant for such an exercise of legislative power as, under the pretense and color of regulating, should subvert or injuriouslly restrain the right itself."

This Honorable Court has held in regard to such right, in *Central of Georgia R. Co.* v. *Wright*, 207 U. S. 127, 138, 52 L. ed. 134, 141, 28 Sup. Ct. Rep. 47: "The notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace", in *Roller* v. *Holly*, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410: "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."; in *Louisville & N. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. 246: "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such."

So far as petitioner is informed this case presents for the first time the question as whether the state can confer to the trial courts the power of prescribing individual rules for substituted service upon defendants under the vague, indefinite, and uncertain clause "in any other manner which

will be reasonably effective to give the defendant notice of the suit."

The opinion of the Supreme Court of Texas rests upon the premise that while the power of the state to prescribe the mode of bringing parties before its courts is limited by the Fourteenth Amendment and the doctrine of *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565 to non-residents, but that as to its own resident citizens, the state has power to prescribe such modes of judicial proceeding and such notice as it may deem proper.

This Honorable Court in the case of *Mullane* v. *Central Hanover B & T Co.*, 339 U. S. 306, 94 L. ed. 867 held that the power of the State to provide for constructive service did not rest upon such a classification, and that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon such a classification; that when notice is a person's due, process which is a mere gesture is not due process.

This Honorable Court has held many times that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer*, 311 U. S. 457, 85 L. ed. 278, 61 S. Ct. 339, 132 A.L.R. 1357; *Grannis* v. *Ordean*, 234 U. S. 385, 58 L. ed. 1363, 34 S. Ct. 779; *Priest* v. *Las Vegas*, 232 U. S. 604, 58 L. ed. 751, 34 S. Ct. 443; *Roller* v. *Holly*, 176 U. S. 398, 44 L. ed. 520, 20 S. Ct. 410; *Simon* v. *Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Resp. 836; *McDonald* v. *Mabee*, 243 U. S. 90, 61 L. ed. 608, 37 Sup. Ct. 343, L.R.A. 1917F; *Re Johnson*, 167 U. S. 120, 42 L. ed. 103, 17 Sup. Ct. 735; *Brown* v. *Wygant*, 163 U. S. 618, 41 L. ed. 284, 16 Sup. Ct. 1159; *Scott* v. *McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. 1108;

Turner v. *Sawyer,* 150 U. S. 578, 37 L. ed. 1189, 14 Sup. Ct. 192; *Renaud* v. *Abbott,* 116 U. S. 277, 29 L. ed. 629, 6 S. Ct. 1194; *Smith* v. *Woolfolk,* 115 U. S. 143, 29 L. ed. 357, 5 S. Ct. 1177; *St. Clair* v. *Cox,* 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. 354; *Windsor* v. *McVeigh,* 93 U. S. 274, 23 L. ed. 914; *Earle* v. *McVeigh,* 91 U. S. 503, 23 L. ed. 398; *Ex parte Robinson,* 19 Wall. (U.S.) 513, 22 L. ed. 205; *Buck* v. *Bell,* 143 Va. 310, 130 S. E. 516, affirmed in 274 U. S. 200, 71 L. ed. 1000; *Mullane* v. *Central Hanover B & T Co.,* 339 U. S. 306, 94 L. ed. 867.

As stated by this Court in *Ochoa* v. *Hernandez y Morales,* 57 L. Ed. 1427, page 1437:

> "Without the guaranty of due process, the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Carta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice and an opportunity for a hearing."

By failing to prescribe an intelligible standard and uniform method for service of citation, the last clause of Rule 106, involved herein, is incompatible with the requirements of the Fourteenth Amendment.

The rule to be applied in determining whether a standard of sufficient definiteness and certainty is contained in a statute was stated in *Connaly* v. *General Construction Co.,* 269, U.S. 385, 389, 391, 46 Sup. Ct. 126, 127, 70 L. Ed. 322, where it is said:

> "The question whether given legislative enactments have been thus wanting in certainty has frequently

> been before this Court. In some of the cases the statutes involved were upheld, in others, declared invalid. The precise point of differentiation in some instances is not easy of statement, but it will be enough for present purposes to say generally that the decisions of the court, upholding statutes is sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, Hygrade Provision Co. *v.* Sherman, 266 U.S. 497, 502, 45 Sup. Ct. 141, 69 L. Ed. 402; Omaechevarria *v.* Idaho, 246 U.S. 343, 348, 38 Sup. Ct. 323, 62 L. Ed. 763; or, as broadly stated by Mr. Chief Justice White in United States *v.* L. Cohen Grocery Co., 255 U.S. 81, 92, 41 Sup. Ct. 298, 301, 65 L. Ed. 516, 14 ALR 1045, "that, for reasons found to result either from the test of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.
>
> See also, *Waters-Pierce Oil Co.* v. *Texas,* 212 U.S. 86, 108, 29 Sup. Ct. 220, 53 L. Ed. 417, *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495.

In order that a statute may be held valid, the duty imposed by it must be prescribed in terms definite enough to serve as a guide to those who have the duty imposed upon them. If the duty is imposed by statute through the use of words which are so general and indefinite that they furnish no such guide, the statute must be declared to be invalid. When it leaves the Legislature a law must be complete in all its terms, and it must be definite and certain enough to enable every person by reading the law, to know what his rights and obligations are and how the law will operate when put into execution. *United State* v. *L. Cohen Grocery Co., supra.*

The breadth and scope of the clause under attack here is such as to put citizens at the mercy of whim and caprice

of any of the many judges and justices in Texas, with no prescribed standards for notice to the defendant. Any method that may be devised by any attorney and presented in a motion will serve as a basis for the adjudication depriving persons of substantial proper rights.

Moreover, attention should be called to the fact that a comparison of the order authorizing the attempted service (R. 5) with the Sheriff's Returns (R. 6, 7) shows there was not a strict compliance with the provisions authorizing such attempted service.

> "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."
>
> *McDonald* v. *Mabee*, 243 U. S. 90, 91, 61 L. Ed. 609, 37 Sup. Ct. 343, LRA 1917F 458.

An analysis of the repercussion of this case clearly shows material violations of the fundamental rights to due process of law as provided by the Fourteenth Amendment. Such abuse and unrestricted power of the courts over a United States Citizen cannot be imposed by State rule.

A decision in this case should determine whether such power may be exercised by State courts.

Respectfully submitted,

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